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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY,
FMC CORPORATION, AND
UNION CARBIDE CORPORATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision below of the United States Court of Appeals for the Third Circuit reflects a basic misunderstanding of the difference between a "fundamentally different factors" ("FDF") variance and a modification of an applicable effluent limitation or standard under §§ 301(c) and (g) of the Clean Water Act. 33 U.S.C. §§ 1311(c) and (g) (1984). The Natural Resources Defense Council, Inc. ("NRDC") shares this misunderstanding. Unlike §§ 301(c) and (g) modifications, FDF variances serve a function in the development of effluent limitations and standards that is entirely consistent with the intent of Congress that similar plants meet similar

effluent limitations and standards, and that such limitations and standards not be "modified" for toxic pollutants. Section 301(l) of the Act, 33 U.S.C. § 1311(l) (1984), was not intended to bar FDF variances for toxic pollutants. Section 301(l) was also never intended to regulate the procedures by which the Environmental Protection Agency ("EPA") promulgates effluent limitations and standards. Yet that is exactly what would result if NRDC's interpretation of § 301(l) were to prevail. Finally, there are convincing policy justifications for an FDF variance regulation, contrary to NRDC's assertion that no such justifications exist.

I. FDF Variances Are Entirely Different From Modifications Barred By § 301(l) Of The Act.

The nature and purpose of the FDF variance regulation is central to the merits, and we thus begin with this key issue.

NRDC argues that FDF variances and modifications under § 301(c) of the Act "serve the identical function" and that accordingly "[i]t makes no sense to assume that Congress prohibited one, and not the other, for toxics." (NRDC Br. at 32). This assertion is patently incorrect. FDF variances and §§ 301(c) and (g) modifications of effluent limitations and standards serve completely different functions. It is entirely reasonable for Congress to have barred §§ 301(c) and (g) modifications for toxic pollutants, without intending to affect the applicability of FDF variances to such pollutants.

An FDF variance is *not* an exception to an otherwise applicable effluent limitation or standard regulation. It is a determination that a plant is fundamentally different from the other plants in the industry in one or more

ways that were not taken into account by EPA in developing the industry regulations, and therefore that the regulations cannot lawfully be applied to the plant. EPA thus determines, by applying the appropriate factors set out in § 304 of the Clean Water Act, 33 U.S.C. § 1314 (1984), what limitations or standards the fundamentally different plant must achieve. The effect of this FDF procedure is to create within the industry regulations a new subcategory that includes the fundamentally different plant. (*See* Pet. Br. at 8).

The fact that one or more factors peculiar to a plant were not considered by EPA in developing the industry regulations is not, as NRDC suggests (NRDC Br. at 10), the result of incompetence by EPA or malfeasance by the particular plant. EPA's effluent limitations and standards for a single industry category may cover literally thousands of plants, each with its own design, process or combination of processes, and plant configuration. Even though EPA has the authority under § 308 of the Act, 33 U.S.C. § 1318 (1984), to obtain data from plants that it intends to regulate, it is impossible to collect and evaluate all of the data that might possibly be relevant from all of the plants that might be covered by a regulation, particularly within the time limits imposed by §§ 301 and 304 of the Act and by the courts[1] for promulgation of effluent limitations guidelines and standards. Likewise, it is impossible for plants to know about, and therefore to submit to EPA, all of the data that may prove to be

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[1] NRDC v. Train, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom.* NRDC v. Costle, 12 E.R.C. 1833 (D.D.C. 1979), *modified sub nom.* NRDC v. Gorsuch (D.D.C. October 26, 1982), *modified sub nom.* NRDC v. Ruckelshaus, Nos. 2153-73 *et al.* (D.D.C. Aug. 2, 1983, Jan. 6, 1984, and July 5, 1984).

relevant in the development of regulations that will apply to the plant.

It is therefore inevitable that EPA will occasionally fail to collect or to consider pertinent data relating to a particular "fundamentally different" plant. As a result, EPA's industry-wide regulations will be defective as to that plant. FDF variances provide a mechanism by which EPA may correct a flaw in its regulations with respect to a particular plant, a flaw which might otherwise lead a reviewing court to set aside the regulations in whole or in part.[2] The FDF mechanism thus furthers the goals of the Clean Water Act by allowing implementation of the effluent limitations and standards for the industry to proceed without delay resulting from a defect in the regulations with respect to one or a few plants.

When a plant receives an FDF variance, it is therefore not *exempted* from applicable requirements. Rather, EPA applies the factors set forth in § 304 of the Act to determine what requirements are applicable to the fundamentally different plant. Absent an FDF variance, the plant would be in a position to challenge the lawfulness of the application to it of the industry regulations. This is not the case for dischargers who receive a modification of limitations or standards under §§ 301(c) and (g) of the Act. Such dischargers are exempted from meeting industry-wide effluent limitations and standards even though EPA considered all of the relevant factors for those plants in developing the regulations and there is no

[2] *See*, EPA v. National Crushed Stone Association, 449 U.S. 64, 77-78 (1980); Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1244 (10th Cir. 1979); Weyerhaeuser v. Costle, 590 F.2d 1011, 1040-41 (D.C. Cir. 1978).

fundamental difference between those dischargers and other plants within the industry as to those factors.

The distinction between FDF variances and modifications under §§ 301(c) and (g) of the Act is apparent when one examines the bases on which variances and modifications may be granted. EPA's pretreatment regulations specify the factors that may be considered in determining whether a plant is fundamentally different, as well as the factors that may not be considered. The factors that may be grounds for receiving an FDF variance include the quality of a discharger's raw waste load and the processes that the discharger employs.[3] The factors that may *not* be the basis for an FDF variance include "the [discharger's] ability to pay for the required waste treatment" and "the impact of a Discharge on the quality of the POTW's receiving waters."[4] These two factors which *may not* be considered as the basis for an

[3] 40 C.F.R. § 403.13(d) (1983). It is not enough for a discharger to prove that it is fundamentally different in one of the ways specified by EPA. A discharger must *also* prove that because it is fundamentally different, it will suffer a pollutant removal cost wholly out of proportion to the cost considered by EPA in developing the industry regulations or a non-water quality environmental impact fundamentally more adverse than the impact considered by EPA. 40 C.F.R. § 403.13(c)(2) (1983). Thus NRDC's focus on the "wholly out of proportion" cost test (NRDC Br. at 54) is misplaced. An individual discharger's cost is *not* a basis for an FDF variance. By taking cost into account once a discharger has demonstrated that it is fundamentally different in ways other than its costs, EPA's FDF variance regulation ensures that the Agency does not receive FDF variance applications from dischargers that may be fundamentally different from the industry but that can meet the industry standards without incurring significantly different costs from the rest of the industry.

[4] 40 C.F.R. § 403.13(e) (1983).

FDF variance are the very bases—and indeed the only bases—on which modifications under §§ 301(c) and (g) *may* be granted. Moreover, these two factors—an individual discharger's ability to pay and water quality impacts—are *not* factors that EPA takes into account in establishing "best available technology" ("BAT") effluent limitations or pretreatment standards. Thus, §§ 301(c) and (g) modifications are not, as NRDC claims (NRDC Br. at 31), a reexamination of BAT factors for an individual source. Instead, both are exemptions from clearly applicable limitations and standards based upon considerations that had nothing to do with the formulation of the limitations and standards.

Sections 301(c) and (g) waivers are entirely different from FDF variances. It is accordingly not at all difficult to understand why Congress chose in § 301(l) of the Act to disallow §§ 301(c) and (g) waivers for toxics, while at the same time leaving intact FDF variances for toxic pollutants.

II. This Court Has Recognized The Unique Function Of FDF Variances.

This Court well described the difference between FDF variances and §§ 301(c) and (g) modifications in *EPA* v. *National Crushed Stone Association, supra*, 449 U.S. 64. In that case, respondents argued that EPA's FDF variance regulation should allow a discharger to obtain a variance from "best practicable technology" ("BPT") regulations if the discharger could not afford to meet the BPT requirements. This argument was based in part on the fact that Congress authorized such an economic-capability waiver of BAT requirements in § 301(c) of the Act. This Court had no difficulty distinguishing between FDF variances and § 301(c) economic-capability

waivers. The Court noted that the FDF variance "is an acknowledgment that the BPT limitation was set without reference to the full range of current practices, to which the Administration was to refer." *Id.* at 77-78. In such circumstances, the Court stated, the limitation "is incomplete." *Id.* at 77. The Court contrasted this with a modification based upon a discharger's economic capability, which "would not have this character." *Id.* The Court noted that a § 301(c) waiver would allow a discharger to obtain less stringent limitations "simply because the point source could not afford a compliance cost that is not fundamentally different from those EPA already considered." *Id.* Thus, the Court cited with approval EPA's statement that a variance is not an exception to BPT or BAT limitations, but rather establishes an individualized BPT or BAT limit. *Id.* at 79 n.18.

NRDC argues that this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ("*du Pont*"), disallowing FDF variances for new sources is "equally applicable to pretreatment standards." (NRDC Br. at 13). This is simply not the case. This Court's decision in *du Pont* regarding new sources is not at odds with the Court's subsequent holding in *EPA* v. *National Crushed Stone Association, supra*, 449 U.S. 64, that FDF variances from BPT regulations for existing sources cure regulations that are otherwise "incomplete." New sources are quite different from existing sources in a way that NRDC appears to misunderstand. NRDC states (NRDC Br. at 14 n.18) that "[n]ew sources can be just as variable in their processes as existing sources" and that this variability "is more difficult to anticipate in a rulemaking because the companies which will be affected and the processes they will seek to construct may not yet be

identifiable." This misses the point entirely. Section 306 of the Act, 33 U.S.C. § 1316 (1984), defines a "new source" as one which begins construction after the publication of proposed new source standards. Thus, new sources will know before they begin construction the requirements that they may be or are expected to meet. New sources accordingly can be designed and constructed to meet those new source standards, as Congress well recognized.[5] This is not the case with existing sources that must be retrofitted to meet requirements imposed on them years, or even decades, after they were designed and constructed. It is therefore far more critical for existing sources than for new sources that the variability among plants be fully reflected in EPA's effluent limitations and standards. The FDF variance for existing sources ensures that this variability will be taken into account.

NRDC's argument as to a Congressional desire for uniformity provides no basis for distinguishing pretreatment standards from BPT and BAT limitations. Section 307(b) of the Act, 33 U.S.C. § 1317(b) (1984), allows a publicly-owned treatment works ("POTW") to modify pretreatment standards on a case-by-case basis to take into account the removal of pollutants by the POTW. Thus, a chemical plant discharging to a POTW that

[5] In discussing § 306 of the Act, the Senate Report on the 1972 legislation noted, "The overriding purpose of this section would be to prevent *new* water pollution problems, and toward that end, maximum feasible control of new sources, *at the time of their construction*, is considered by the Committee to be the most effective and, in the long run, the least expensive approach to pollution control." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Committee on Public Works, Serial No. 1, 93d Cong., 1st Sess. 1476 (1973) ("1972 Legis. Hist.").

removes a high percentage of a toxic pollutant may be able to discharge twice as much of the pollutant as a plant discharging to a less efficient POTW. As a result of these so-called "removal credits," which differ from one POTW to the next, there will be little or no uniformity in the pretreatment standards that dischargers in an industry category must meet.[6] These modifications of pretreatment standards by POTWs also distinguish such standards from new source standards since, as this Court noted in *du Pont*, Congress authorized no modifications of new source standards.

NRDC argues that pretreatment standards must be treated like the new source standards because Congress used the word "standards" in both contexts. (NRDC Br. at 13). As noted in our brief (Pet. Br. at 21 n.22), the fact that Congress used the word "standard" in the context of new source and pretreatment requirements and the word "limitations" elsewhere is of no significance. NRDC itself quite rightly pointed out in its brief in *du Pont* that § 316 of the Act, 33 U.S.C. § 1326 (1984), uses the word "standards" when it is clear that Congress was referring to effluent limitations, and Congress itself referred to the setting of "standards" pursuant to §§ 301 and 306 of the Act. Brief for Natural Resources Defense

[6] Congress authorized removal credits "in order to avoid treatment for treatment's sake." *A Legislative History of the Clean Water Act of 1977*, Committee on Environmental and Public Works, Serial No. 14, 95th Cong., 2d Sess. 343 (1978). Congress recognized that by authorizing such credits, pretreatment standards would be revised for an "individual source or individual classes of sources" on a case-by-case basis by owners or operators of POTWs. *Id.* at 403, 461-62.

Council, Inc. as *Amicus Curiae* at 39 n.104, *du Pont*, *supra*.[7]

Contrary to NRDC's claim, it is also of no significance that pretreatment, like new source, standards may require "no discharge" since BPT limits in some cases also have required no discharge. The fact that it is unlawful for any owner or operator to operate any source in violation of a pretreatment or new source standard is similarly of no consequence, since § 301 of the Act makes it unlawful for any person to discharge a pollutant in violation of BPT and BAT effluent limitations.

Thus the reasons set forth by this Court in *du Pont* for disallowing FDF variances for new sources do not apply to FDF variances from BPT, BAT or pretreatment requirements. The decision in *du Pont* disallowing FDF variances for new sources should accordingly be limited to new sources, which can be designed and constructed to meet EPA's new source standards.

III. Establishing Different Limits And Standards For Atypical Plants Is Consistent With The Act.

Our opening brief explained why FDF variances for fundamentally different plants are supported by the Act, and why § 301(l) of the Act was not intended to bar FDF variances for toxic pollutants. (Pet. Br. at 17-34). NRDC's arguments to the contrary are not persuasive.

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[7] Moreover, since FDF variances were not adopted by EPA until after Congress enacted the Clean Water Act in 1972, Congress could not possibly have intended by its choice of the words "limitations" and "standards" in the 1972 Act to allow FDF variances for BPT or BAT limitations, while disallowing such variances from pretreatment and new source requirements.

NRDC cites the legislative history of the Act as evidence that, with the sole exception of § 301(c), Congress wanted uniform national requirements for BAT, and hence for pretreatment requirements which are similar to BAT. (NRDC Br. at 12). The legislative history in fact demonstrates that different plants must be treated differently. Congress never intended dissimilar plants to be subject to similar discharge requirements. Congress stated in 1972 that "*similar* point sources with *similar* characteristics ... [must] meet *similar* effluent limitations."[8] The issue is thus not uniformity *per se*, as NRDC would have this Court believe, but rather uniformity among similar plants. Different plants may be subject to different effluent limitations and standards under §§ 301, 304 and 307 of the Act, because these provisions of the Act direct EPA to take into account a number of factors which may vary from plant to plant. (*See* Pet. Br. at 5, 17-18).

In a perfect world, EPA could consider all relevant statutory factors during a rulemaking to establish industry-wide effluent limitations and standards, and divide an industry category into as many subcategories as necessary to reflect the differences among plants. This is not a perfect world, however. EPA has therefore adopted a mechanism—the FDF variance—to achieve the same end result as subcategorization would achieve.

As noted in our brief (Pet. Br. at 35-40), even NRDC concedes that a subcategory may be created for a single plant. NRDC's attempt in its brief (NRDC Br. at 32-39) to distinguish subcategorization from FDF variances fails to deal with the fundamental point, namely that

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[8] 1972 Legis. Hist., *supra*, at 309 (emphasis added).

EPA could accomplish by subcategorization the very same result that NRDC claims is barred by § 301(l), namely the promulgation of limits that apply only to a single plant. And EPA could do this without running afoul of any intent or directive of Congress. As the passage from the legislative history quoted by NRDC notes (NRDC Br. at 33), effluent limitations were intended to be "*as uniform as possible*,"[5] not uniform without regard to differences among plants. The passages that NRDC quotes from the legislative history (NRDC Br. at 33) are not to the contrary. No one is arguing that Congress intended individual factors addressed in the industry rulemaking to be taken into account again when applicable effluent limitations or standards are applied to a plant (NRDC Br. at 33); this is not the function of an FDF variance. Similarly, no one is arguing that Congress intended to require EPA to reconsider on a plant-by-plant basis the economic impact of a set of limitations or standards (NRDC Br. at 33); this is also not the function of an FDF variance. Congress did not, however, intend that EPA ignore fundamental differences among plants in the establishment of industry-wide limitations and standards. The very legislative history quoted by NRDC (*see* p. 11, *supra*) concerning the need to treat only similar plants similarly makes this point clear.

Perhaps recognizing the weakness of its effort substantively to distinguish subcategorization from FDF variances, NRDC turns to arguments about the difference in the timing and procedures used to adopt subcategories and FDF variances. (NRDC Br. at 35-37). There is no legislative history to support NRDC's argument

[5] 1972 Legis. Hist., *supra*, at 172 (emphasis added).

that in adopting § 301(l), Congress was concerned either about the timing of or procedures for granting variances; it was instead concerned about substance.

In light of the fact that—in substance—an FDF variance is merely the creation of a new subcategory for the fundamentally different plant, it is impossible to believe that Congress would allow, and indeed require, EPA to take differences among plants into account in establishing industry regulations while at the same time barring EPA from granting an FDF variance subsequently to take into account the differences it overlooked in establishing the industry regulations.

IV. Congress Did Not Intend To Bar FDF Variances For Toxic Pollutants.

There is no evidence that in adopting § 301(l), Congress intended to bar FDF variances for toxics. In fact, the legislative history indicates that § 301(l) was not intended to affect FDF variances at all.

NRDC states several times that the 1977 Clean Water Act legislative history "confirms that Congress intended to ban all variances for toxic pollutants." (NRDC Br. at 8; *see also, id.* at 16, 20). NRDC then cites to the use in the legislative history of the words "modification" and "variance" interchangeably (NRDC Br. at 15-16). In seeking to minimize the statement of Congressman Roberts, however, that § 301(l) would bar §§ 301(c) and (g) waivers for toxic pollutants, NRDC claims that "Congressman Roberts had no reason to list other examples of variances prohibited by Section 301(l) [because] Congress did not believe other variances were authorized." (NRDC Br. at 21). This statement directly contradicts NRDC's assertions that Congress intended in 1977

specifically to bar FDF variances for toxic pollutants. It is axiomatic that Congress could not have been unaware of FDF variances while at the same time specifically intending to limit EPA's ability to use such variances.

But Congress was aware of FDF variances. It was certainly aware of this Court's very important decision in *du Pont*, which held that BPT limitations could be established on a category-by-category basis *only* if a provision was made to deal with fundamentally different plants (Pet. Br. at 32), and NRDC itself had testified before Congress that a "fundamental variance provision" was integral to the Act's system of "national, uniform, minimum effluent limitations."[10] It is irrelevant that EPA may not have applied the FDF variance to BAT or pretreatment standards prior to 1977. What is of critical importance in understanding the intent of Congress in adopting § 301(l) is that EPA *had allowed FDF variances* from BPT regulations *for toxic pollutants*. (*See* EPA Br. at 30 and n.21-22). As NRDC points out, Congress focused heavily on the control of toxics in the 1977 amendments to the Clean Water Act. If Congress intended to upset an existing EPA practice and to disallow FDF variances for toxic pollutants, it would have expressly so stated. Yet there is no evidence that Congress intended in any way to alter EPA's regulations authorizing FDF variances for toxic pollutants. NRDC tries to rationalize this by claiming (NRDC Br. at 27) that it is not significant that Congress did not direct EPA to "[wring] more out of BPT for a few plants" by

[10] *See Federal Water Pollution Control Act Amendments of 1977*, Hearings before the Subcommittee on Environmental and Public Works, 95th Cong., 1st Sess., Serial No. 95-H25, Part 9, at 37 (1977).

disallowing FDF variances from BPT regulations. This misses the point entirely. Once NRDC concedes, as it appears to have done (NRDC Br. at 26-27), that § 301(l) did *not* direct EPA to disallow FDF variances from *BPT* regulations for toxic pollutants, then it has conceded that § 301(l) was *not* in fact intended to bar *all* variances for toxics, as NRDC elsewhere claims in its brief (NRDC Br. at 8).[11] If § 301(l) was not intended to bar FDF variances from BPT regulations for toxics, then § 301(l) cannot be read literally. (*See* EPA Br. at 24-27). The issue is thus which variances Congress intended to prohibit in § 301(l). The answer to that is clear. The legislative history of § 301(l) indicates that Congress only intended § 301(l) to apply to §§ 301(c) and (g) of the Act. (*See* Pet. Br. at 27-34).

There are sound policy reasons why Congress would not have intended in § 301(l) to bar FDF variances for toxic pollutants. By 1977, Congress was fully aware of the enormity of the tasks that it had assigned to EPA in the Clean Water Act. It knew that numerous EPA regulations had been set aside by courts and remanded to the Agency. It would have made no sense for Congress to have prohibited EPA from maintaining a safety valve to help protect its regulations from challenge, especially when that safety valve had been used only sparingly and thus was not, as NRDC claims, a gaping loophole in the implementation of the statute's requirements.

[11] NRDC's argument that Congress was not concerned about BPT controls because BPT was only an "interim" measure (NRDC Br. at 27) is unpersuasive. These "interim" BPT controls were to be in effect for seven years – until 1984 when BAT would be implemented. Congress thus would have had reason to be concerned about BPT controls.

Moreover, contrary to what NRDC implies (NRDC Br. at 10), the task of promulgating defensible limitations and standards has not gotten markedly easier over the years.[12] It is still not possible for EPA to gather, evaluate, and address all relevant data in the development of all industry-wide regulations. (*See* EPA Br. at 4-6, 37.) The FDF variance mechanism is thus still an essential and limited safety valve.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit prohibiting FDF variances for toxic pollutants should be reversed.

Respectfully submitted,

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[12] EPA is under court-ordered deadlines to promulgate effluent limitations guidelines and standards regulations (*see* n.1, *supra*) but is still unable to meet those deadlines due to the complexity and enormity of the task of promulgating such regulations. As a result, EPA has been compelled continually to seek from the court extensions of the deadlines for promulgating the regulations, as reflected in the numerous modifications of the court's order. *See* note 1, *supra*.